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Review of implementation of the United Nations Convention against Corruption

Implementation of chapter V (Asset recovery) of the United Nations Convention against Corruption

Thematic report prepared by the Secretariat

Summary

The present report contains a compilation of the most common and relevant information on successes, good practices and challenges identified and observations made during the second cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption with regard to the implementation of chapter V (Asset recovery) of the Convention.

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I. Introduction, scope and structure of the report

1. In its resolution 3/1, the Conference of the States parties to the United Nations Convention against Corruption adopted the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption, contained in the annex to that resolution, and the draft guidelines for governmental experts and the secretariat in the conduct of country reviews and the draft blueprint for country review reports, contained in the appendix to the annex, to be finalized by the Implementation Review Group at its first meeting, held in Vienna from 28 June to 2 July 2010.

2. In accordance with paragraphs 35 and 44 of the terms of reference of the Mechanism, the present thematic report contains a compilation of the most common and relevant information on successes, good practices, challenges and observations contained in the country review reports, organized by theme, for submission to the Implementation Review Group, to serve as the basis for its analytical work.

3. The present thematic report contains information on the implementation of chapter V (Asset recovery) of the Convention by States parties under review in the second cycle of the Mechanism. It is based on information included in six country review reports that had been completed, or were close to being completed, at the time of drafting. The report focuses on current trends in and examples of implementation, and includes cumulative tables and figures showing the most commonly encountered challenges and good practices.

4. As the various articles of the four substantive chapters of the Convention are closely related, the present report builds on the previous thematic reports covering the implementation of chapters III and IV of the Convention. Chapters III and IV were under review in the first cycle. The structure of the present report follows that of the executive summaries and thus groups certain articles and topics that are closely related in clusters.

II. General observations on challenges and good practices in the implementation of chapter V of the Convention

5. As requested by the Implementation Review Group, the present report contains an analysis of the most prevalent challenges and good practices in the implementation of chapter V, organized by article of the Convention. The figures and tables below cover the six countries under review.[1]

[1] Data used in the preparation of the present report are based on country reviews that had been finalized as at 15 February 2018.

Figure I
Challenges identified in the implementation of chapter V of the Convention

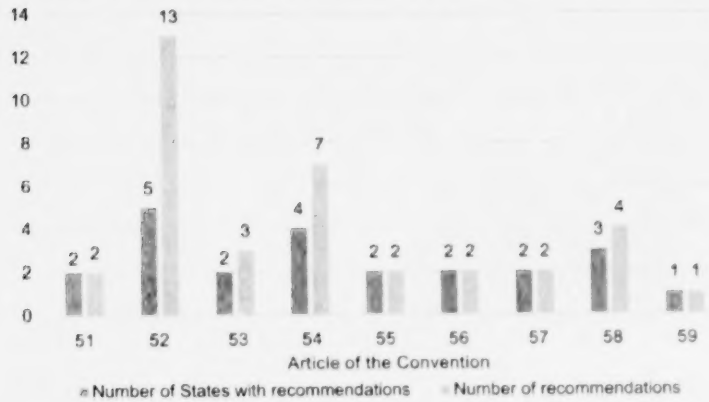

Table 1
Most prevalent challenges in the implementation of chapter V of the Convention

Article of the Convention	*No. of States with recommendations*	*No. of recommendations issued*	*Most prevalent challenges in implementation (in order of prevalence, grouped by article of the Convention)*
Article 52	5	13	Identification of foreign and domestic politically exposed persons; allocation of resources; reporting of foreign interests; lack of emergency freezing powers for law enforcement; systematic identification of beneficial ownership; prohibition of "shell banks".
Article 54	4	7	Insufficient provisions on confiscation, seizure and freezing; lack of non-conviction-based confiscation.
Article 58	3	4	Emergency freezing powers for the financial intelligence unit.
Article 53	2	3	Lack of recovery mechanisms enabling foreign States to establish their title to or ownership of property, or to be awarded compensation or damages.
Article 51	2	2	Streamlining asset recovery procedures.
Article 57	2	2	Insufficient measures for the return of crime proceeds to requesting States in cases of embezzlement of public funds.
Article 55	2	2	Obligation to give the requesting State party an opportunity to present its reasons in favour of continuing a measure before it is lifted.
Article 56	2	2	Incorporation of regional standards into domestic law.
Article 59	1	1	Domestication of the Convention as treaty basis.

Figure II
Good practices identified in the implementation of chapter V of the Convention

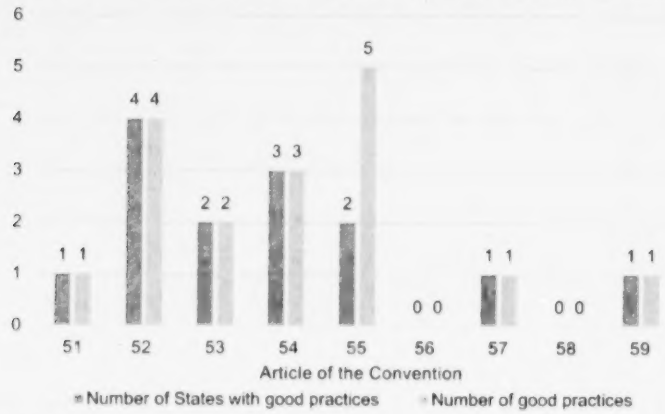

Table 2
Most prevalent good practices in the implementation of chapter V of the Convention

Article of the Convention	*No. of States with good practices*	*No. of good practices*	*Most prevalent good practices (in order of prevalence, grouped by article of the Convention)*
Article 55	2	5	Flexibility of mutual legal assistance laws; close cooperation and consultation, use of the Convention as legal basis for returns.
Article 52	4	4	The definition of politically exposed persons includes domestic politically exposed persons; establishment of registry of bank accounts; sharing of financial intelligence with other States.
Article 53	2	2	Explicit granting of legal personality to States.
Article 54	3	3	Evidentiary requirements for the recognition of foreign confiscation orders; proactive issuing of freezing orders; non-conviction-based confiscation.
Article 51	2	2	Active engagement in the development and promotion of international law.
Article 57	1	1	Return of property to bona fide third parties.
Article 59	1	1	Subregional cooperation on the basis of the Convention.

III. Implementation of chapter V of the Convention

A. General provision; special cooperation; bilateral and multilateral agreements and arrangements (articles 51, 56 and 59)

6. With regard to engaging in efforts to recover assets, all States reported on various arrangements they had in place to address asset recovery (art. 51). At an

institutional level, one of the countries whose review had been completed had established a separate entity for the recovery of assets. Three States had established separate entities for the management of assets. Those States that did not have dedicated recovery or management entities took a more decentralized approach, relying on institutions such as prosecution services, tax authorities and police to pursue, secure, and manage assets prior to confiscation. One country had enacted a single dedicated instrument governing the recovery and management of assets. Those States that had no dedicated legislation used more generic laws such as the criminal procedure code or the anti-money-laundering laws to recover assets.

7. Five States allowed the spontaneous transmission of information, for example reports of suspicious transactions and unusual payments, that might lead to a request under chapter V of the Convention (art. 56). Four States provided for the spontaneous transmission of information in specific laws, and in three of those States, the spontaneous transmission of information was covered by the law on mutual legal assistance. One country provided for the spontaneous transmission of information in its anti-corruption law, while another made such provisions in its anti-money-laundering law. Generally, States that had not specifically legislated on the spontaneous transmission of information nonetheless did have standing practices to provide assistance without prior request. In that regard, five States had empowered their financial intelligence units to exchange information without prior request by virtue of their membership in the Egmont Group of Financial Intelligence Units. The Egmont Group provided a platform for the secure exchange of expertise and financial intelligence to combat money-laundering and the financing of terrorism.

8. All States had ratified multilateral and bilateral agreements to enhance international cooperation pursuant to chapter V (art. 59). Four of those States used the Convention as a legal basis and allowed the direct application of its self-executing provisions.

B. Prevention and detection of transfers of proceeds of crime; financial intelligence unit (articles 52 and 58)

9. With regard to money-laundering, States reported having in place various measures for the prevention and detection of proceeds of crime (art. 52, para. 1). In their legislation on money-laundering and financial institutions, all States were found to have requirements in place to verify the identity of customers. Furthermore, all States had measures in place to determine the identity of beneficial owners of funds deposited into high-value accounts. Five States had measures in place to apply enhanced scrutiny to accounts sought or maintained by or on behalf of politically exposed persons (art. 52, para. 2). One of those States, however, had yet to impose a general obligation to exercise due diligence with customers. Some States had a definition of politically exposed persons but faced challenges in the determination of foreign politically exposed persons. Two States had not included domestic politically exposed persons in their definition.

10. All States had legislation that required financial institutions to maintain adequate records (art. 52, para. 3). Records had to be kept for periods ranging from six to ten years. All States but one had measures in place to prevent the establishment of banks that had no physical presence and were not affiliated with a regulated financial group, known as "shell banks". All States but one required financial institutions to refuse to enter into relationships with shell banks (art. 52, para. 4). However, only one State reported prohibiting the continuation of a correspondent banking relationship with such institutions or with other foreign financial institutions that permitted their accounts to be used by shell banks.

11. Five States reported having financial disclosure systems in place for appropriate public officials (art. 52, para. 5). One country did not have a financial declaration system for its public officials on grounds of right-to-privacy concerns. However, that country required its public officials to report their worldwide income and assets in tax

declarations. In one country, the asset declaration system was applicable to all public servants. In another country the coverage of such declarations was limited in scope. A recommendation was made to that country to require such declarations from a broader category of public officials. In another country, not only public officials themselves were required to declare their property, but also their spouses and children. Of the five States with financial disclosure systems in place, only two imposed sanctions for non-compliance. In some countries, asset declarations were filed electronically and kept confidential. Declarations in those countries were not readily available to the public, but they were accessible to law enforcement authorities. In one country, asset disclosure requirements also applied to foreign properties and financial interests. In another country, however, declarations did not include foreign assets. In one case, a recommendation was made to permit competent authorities to share financial disclosure information obtained from other States.

12. Four States had measures in place requiring appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts (art. 52, para. 6). In some countries, such measures were found to be part of tax provisions or other instructions. One State had no measures in place requiring public officials to report such relationships to the appropriate authorities, and received recommendations to consider adopting them.

13. All States had financial intelligence units that served as national centres for receiving, analysing and disseminating to authorities reports of suspicious financial transactions (art. 58). In addition, all States were members of the Egmont Group of Financial Intelligence Units. However, varying mandates and models were in place for the financial intelligence units of the reporting States. Some were mostly administrative in nature, while others had investigative tasks as well. In addition, different units had different powers. For example, some units had authority to freeze assets for up to 48 hours in emergencies, while others had no authority to freeze assets at all. One country was advised to consider granting its financial intelligence unit the power to order administrative asset freezes or to block the execution of suspicious transactions for a specified period. Another challenge identified was that one State allocated insufficient resources to its financial intelligence unit and other supervisory authorities to enable them to carry out their duties, and a recommendation was issued to that State to ensure that sufficient resources were allocated (art. 52, para. 1).

C. Measures for direct recovery of property; mechanisms for recovery of property through international cooperation in confiscation; international cooperation for purposes of confiscation (articles 53, 54 and 55)

14. With one exception, none of the countries with completed reviews had enacted specific provisions expressly allowing other States to initiate civil action in its courts to establish title or ownership of property acquired through the commission of an offence under the Convention, also known as locus standi or legal standing (art. 53, subpara. (a)). Those States referred to the general principles enshrined in their codes of civil procedure or to provisions of civil litigation under common law. Four States confirmed that the law treated foreign States on the same footing as any other legal person. However, the anti-corruption act of one country expressly gave its courts jurisdiction over civil actions for the direct recovery of property.

15. Likewise, few States parties had rules specifically permitting courts to award compensation or damages to another State party for offences under the Convention, to be paid by the offender (art. 53, subpara. (b)). However, in all cases, the general rules of civil law and civil procedure enabled courts to do so. Accordingly, to claim compensation or damages before a court in those States, other States had to comply with the general rules of civil procedure, which, for example, meant they had to be represented by a lawyer registered with a national bar association. Two States required

a deposit for court fees, known as *cautio judicatum solvi*, to be paid before legal action could be taken. Four States recognized other States parties' claims as legitimate owners of property in confiscation proceedings as required under article 53, subparagraph (c), whereas one State did not.

16. All States had legislative frameworks to give effect to foreign confiscation orders issued by courts of other States parties (art. 54, subpara. 1 (a)), in particular by directly recognizing such orders. However, one State was encouraged to implement, in practice, provisions on confiscation, seizure and freezing. Although in all States, the competent authorities had powers to issue domestic confiscation orders (art. 54, para. 1 (b)), one State had a list of offences for which the competent courts could issue confiscation orders under the Criminal Code that did not include all offences under the Convention. The same State had not yet considered allowing confiscation of assets in the absence of a criminal conviction under certain circumstances (non-conviction-based confiscation, art. 54, para. 1 (c)).

17. Article 54, paragraph 2, which requires States parties to permit their competent authorities to freeze or seize property, either upon a foreign order or upon request, had been implemented in most States. In one State, authorities did not have powers to enforce foreign freezing or seizure orders directly, but could issue such orders under domestic procedures instead, either at their own initiative or in response to a request from a foreign State. The same State was asked to consider giving its financial intelligence unit powers to order administrative freezes or block the execution of a transaction for a specific period. In three States, authorities had powers to preserve property proactively, in the absence of a request (art. 54, para. 2 (c)).

18. Article 54 concerns domestic rules for international cooperation in confiscation, while article 55, paragraphs 1 and 2, sets out specific obligations that apply in concrete cases. In five States, the obligations referred to in article 54 and in article 55, paragraphs 1 and 2, are applied directly, in line with their self-executing nature. In most cases, requests for confiscation as referred to in article 55 had to comply with the legislation on international cooperation in criminal matters and the criminal procedure code of the requested State and with bilateral and multilateral conventions. One State had specific provisions in its anti-corruption act. These legal provisions and international conventions constituted the domestic law and procedural rules referred to in article 55, paragraph 4, that governed decisions and actions relating to confiscation, freezing and seizure. Four States considered the Convention the necessary and sufficient treaty basis for taking these measures. One State could not use the Convention as legal basis but, at the same time, did not require a treaty to cooperate to effect confiscation.

19. Several States had not furnished copies of their laws and regulations on confiscation to the Secretary-General of the United Nations as required under article 55, paragraph 5. Countries under review were systematically advised that they could meet this obligation by submitting the relevant legislation to the United Nations Office on Drugs and Crime in the course of the review process. One country reported its practice of holding consultations with requesting States and, if no response was received from the requesting State, the practice was not to refuse, but to close cases provisionally, so that they might be reactivated once additional information were received. Another country in practice applied a *de minimis* threshold equivalent to about $10,000 for freezing orders, but only if the assets were those of a legal person. Only one country stated that its legislation did not provide for giving a requesting State an opportunity to present its reasons in favour of continuing a provisional measure before it is lifted. The rights of bona fide third parties were generally protected in the relevant legislation and conventions.

D. Return and disposal of assets (article 57)

20. Most countries reviewed to date did not have practical experience with the return and disposal of assets. Only one country had returned sizeable amounts of money

stemming from offences under the Convention. However, all States confirmed that they could comply with the general principle. Three States indicated that they could return confiscated property by direct application of the Convention. In addition, or instead, all countries had some domestic legal basis for the return and disposal of assets in their law on international cooperation in criminal matters, their criminal procedure code, their anti-corruption law or their law on money-laundering and the financing of terrorism. In most cases, confiscated assets became property of the State, after which the reviewed countries could transfer that property to another State.

21. The applicable legislation and conventions protected the interests of bona fide third parties, including legitimate owners and legal persons (art. 57(2)).

22. One State reported that, although it had no legal basis for waiving the requirement to obtain a final judgment in the requesting State, it could return assets on a different basis, for example through separate in rem forfeiture proceedings. Moreover, it could return assets on the basis of a domestic confiscation order even in the absence of a foreign final judgment. Any injured party could join criminal proceedings as a private party and claim damages.

23. All States could deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposal of confiscated property (art. 57, para. 4). Likewise, all States could conclude agreements or arrangements on a case-by-case basis for the final disposal of confiscated property, although none had done so yet. In one country, the anti-money-laundering act required confiscated property to be divided equally between the requesting State and the requested State. However, that rule applied only in the absence of a treaty that stipulated otherwise, and the Convention was considered such a treaty.